IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

Nos. 523-530

UNITED STATES OF AMERICA,
Petitioner,

v.

FRANKFORT DISTILLERIES, INC.; NATIONAL DISTILLERS PRODUCTS CORPORATION; BROWN FORMAN DISTILLERS CORPORATION; HIRAM WALKER, INCORPORATED; SCHENLEY DISTILLERS CORPORATION; SEAGRAM DISTILLERS CORPORATION; McKESSON & ROBBINS, INCORPORATED; J. E. SPEEGLE.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

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BRIEF OF FRANKFORT DISTILLERIES, INC., NATIONAL DISTILLERS PRODUCTS CORPORATION, BROWN FORMAN DISTILLERS CORPORATION, HIRAM WALKER INCORPORATED, SEAGRAM-DISTILLERS CORPORATION, and McKESSON & ROBBINS, INCORPORATED, IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

STATEMENT.

The petition, in summarizing the allegations of the indictment with respect to the nature of the business involved, omits all mention of the vital allegation that "Under the laws of the State of Colorado, alcoholic beverages shipped and sold in bottles by producers thereof may be sold to retailers in the State of Colorado only by whole-

salers licensed as such under the laws of Colorado" (R. 13). As the lower court recognized, even this allegation is an incomplete statement of the effect of the Colorado liquor laws upon this business.

The law of Colorado, to effectuate a policy of border control, requires all alcoholic liquors to be the sole and exclusive property of a duly licensed Colorado wholesaler at the time such liquors cross the Colorado State line (Regulation 12 C of the State Licensing Authority). Under the Colorado law all such liquors must be affixed by the state licensed wholesaler with the proper excise tax stamp before sale or transfer within the State (Regulation 1(3)).[1] In other words, before liquor imported into Colorado can be sold or offered for sale to any retailer it must

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[1] The regulations were promulgated by the State Licensing Authority pursuant to Section 23(c) of the Colorado Liquor Code (Colorado Statutes Annotated (1935), Chapter 89, Section 38(c)), which reads, in part, as follows:

> "(c) All alcoholic liquors manufactured in this state, or sold therein, shall bear on the said container or containers, an excise stamp to be provided by the State Licensing Authority, * * * and all alcoholic liquors imported into the state immediately upon entry therein, be affixed with the said excise stamp before being sold or offered for sale within the said state, and in accordance with the rules and regulations which may be promulgated by the State Licensing Authority * * *."

The relevant provisions of Regulation 1 are as follows:

> "3. All malt, vinous and spirituous liquors sold or transferred within the State of Colorado must be affixed with the proper stamps before sale or transfer. Manufacturers, rectifiers and the first licensee receiving liquor within the State are primarily liable for the excise tax. * * * Wholesalers shall affix the proper stamps upon all liquors sold by them within this State to retailers or consumers prior to delivery. * * *"
>
> "4. Only Colorado licensed manufacturers, rectifiers and wholesalers shall be permitted to purchase excise tax stamps from the State Treasurer. * * *"

Regulation No. 12 C is as follows:

> "It is hereby required that all alcoholic liquors and fermented malt beverages shall be the sole and exclusive property of and subject to the unrestricted power of disposal of a duly licensed Colorado wholesale liquor dealer as defined in Section 17 of Chapter 142 or Section 5(2) of Chapter 82, Session Laws of Colorado of 1935 at the time such liquors and malt beverages cross the Colorado State line and are imported into this State for the purpose of being sold, offered for sale or used in this State."

become the property of a licensed Colorado wholesaler and come to rest in his warehouse where packages are broken and tax stamps affixed by him. These facts are fundamental to a proper understanding of the narrow and essentially local issue involved in this case.

The Statement in the petition points out that the decision of the Circuit Court of Appeals related only to the second count of the original indictment. Count One of that indictment alleged a conspiracy with respect to wholesale prices but that Count was quashed (R. 15-19, 53-54). In the statement of questions, specification of errors and argument, however, the petition refers to a conspiracy "to blanket * * * the entire wholesale and retail trade" and to "eliminating price competition among wholesalers and retailers." No issue with respect to wholesale prices or the wholesale trade is presented on the present record. Count Two of the indictment relates only to retail prices and the retail trade within the State of Colorado.

The petition states that it is not entirely clear upon what grounds the court below held that the indictment does not sufficiently allege restraint of interstate commerce which the Sherman Act prohibits. If the opinion is read as a whole, we believe that both the grounds for the decision and the nature of the only question presented to this Court become abundantly clear. The Circuit Court of Appeals held only that an agreement, for purposes related solely to local conditions in the retail trade, to subject to price maintenance on retail sales within Colorado alcoholic beverages, which can be purchased by the retailers only after interstate movement has ceased and the beverages have come to rest in the ownership and custody of local wholesalers, is not a restraint of interstate commerce under the Sherman Act solely because such alcoholic beverages once moved in interstate commerce.

QUESTIONS PRESENTED.

In the light of these additional facts the questions really presented in this case are these:

1. Whether the refusal by local retailers, for purposes related only to local conditions in the retail trade, to purchase from local wholesalers alcoholic beverages which are no longer in interstate commerce restrains interstate commerce and violates the Sherman Act solely because a substantial part of those beverages once moved in interstate commerce.

2. Whether an agreement to subject alcoholic beverages, which can be purchased by Colorado retailers only from Colorado wholesalers after interstate movement has ceased, to agreements to maintain the resale price in local retail sales restrains interstate commerce and violates the Sherman Act solely because a substantial part of those beverages once moved in interstate commerce.

3. Whether an agreement to subject to retail price maintenance the retail trade of a single state in alcoholic beverages, no longer in interstate commerce when acquired by the retailers, restrains interstate commerce and violates the Sherman Act solely because a substantial part of those beverages was once shipped in interstate commerce.

ARGUMENT.

The decision of the Lower Court is not in conflict with Applicable decisions of this Court.

The decision of the lower court is not in conflict with *Fashion Originators' Guild of America, Inc.*, v. *Federal Trade Commission*, 312 U. S. 457, and similar cases.[2] The

[2] The claim of conflict is based on selecting a single sentence from the opinion of the lower court and disregarding the balance of the opinion and the actual decision.

lower court decided that concerted refusal by local retailers, for purposes related wholly to local conditions in the retail trade, to purchase from local wholesalers alcoholic beverages no longer in interstate commerce did not restrain such commerce and violate the Sherman Act solely because a substantial part of those beverages were produced outside the State and had once moved in interstate commerce. That holding is in accord with applicable decisions of this Court. *Industrial Association of San Francisco* v. *United States*, 268 U. S. 64; *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103.

The cases cited by the Government presented a very different situation. *Fashion Originators' Guild* v. *Federal Trade Commission*, *supra*, involved a nationwide conspiracy to eliminate from commerce, whether interstate or intrastate, all garments made from copied designs. *Loewe* v. *Lawlor*, 208 U. S. 274, *Duplex Printing Press Company* v. *Deering*, 254 U. S. 443 and *Bedford Cut Stone Company* v. *Journeymen Stone Cutters' Ass'n*, 274 U. S. 37, each involved a boycott in one state (or many states) designed to compel unionization of an industry in another state by suppressing interstate trade in its products. In those cases suppressing interstate commerce was a means deliberately adopted for effecting the ultimate purpose, not merely an incidental result. In this case there was an exclusively local aim, a desire to fix retail liquor prices in Colorado only. Pursuant to that local aim, Colorado retailers refrained from purchasing from Colorado wholesalers liquors not subject to price maintenance contracts. The effect, if any, upon interstate commerce was purely fortuitous and incidental, the result of local activities for local purposes.

The assertion in the petition that in cases of this character a purpose to affect interstate commerce is immate-

rial and no allegation of intent is necessary does not state the law. It is sufficient to point out the different results reached in the first and second *Coronado* cases, *United Mine Workers* v. *Coronado Coal Company*, 259 U. S. 344 and *Coronado Coal Company* v. *United Mine Workers*, 268 U. S. 295. Acceptance of the Government's contention in this regard—rejected, incidentally, in *Industrial Association* v. *United States* and *Levering & Garrigues Co.* v. *Morrin*, *supra*,—would outlaw under the Sherman Act every form of local action with respect to commodities which have ever moved in interstate commerce, whether the action was directed to a local purpose or had a wider scope. A local temperance society could not agree to refuse to patronize retailers of groceries and drugs who also sold liquor.

The Government is apparently willing to push the argument this far, at least where the local activity affects price competition. (Page 13 of Petition.) The cases upon which it relies (*Local 167* v. *United States*, 291 U. S. 293, *Swift and Company* v. *United States*, 196 U. S. 375, and *California Retail Grocers & Merchants Association, Limited* v. *United States*, 139 F. (2d) 978), do not support its position. Each of them involved restraints operating in part directly upon interstate commerce. *Local 167* v. *United States* showed a series of restraints beginning at the point where commodities were unloaded from the interstate carrier, in part in another state, and affecting its transportation to and sale by wholesalers to retailers. In the *Swift* case, the restraints operated at an intermediate point in interstate commerce. The commodities involved not only had moved in interstate commerce but were in large part destined for further movement in such commerce. These were not cases of activity only with respect to retail sales after goods had finally come to rest within a state. As for *California Retail*

Grocers & Merchants Association, Limited v. *United States*, as the opinion itself points out, "The purpose of the conspiracy was to 'stabilize' the entire trade in California in all sales, whether interstate or intrastate." (139 F. (2d) at 983).

Nor is the decision of the lower court in conflict with cases in which this Court has condemned illegal systems of resale price maintenance. *United States* v. *Univis Lens Co.*, 316 U. S. 241, *Dr. Miles Medical Company* v. *Park & Sons Company*, 220 U. S. 373 and *Ethyl Gasoline Corporation* v. *United States*, 309 U. S. 436 all involved comprehensive systems of price maintenance initiated by a producer in one state, covering both wholesale and retail transactions, affecting interstate as well as intrastate sales, and extending into every state where the product was marketed. The purpose and necessary effect was to limit the entire market in the product. In this case, on the other hand, price maintenance has been initiated by retailers in a single state and affects only retail prices in local transactions in that state. The controlling decisions are *Seagram-Distillers Corporation* v. *Old Dearborn Distributing Co.*, 363 Ill. 610, 2 N. E. (2d) 940 and *Joseph Triner Corporation* v. *McNeil*, 363 Ill. 559, 2 N. E. (2d) 929, affirmed in *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183.[3]

The petition states that the court below erroneously relied on cases such as *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, involving a statute confined to acts "in" interstate commerce. That and similar cases were cited by the court below in support of its conclusion that liquor, the

[3] Both cases involved commodities produced outside Illinois and distributed within the state by sales affiliates of the producers. This Court did not even discuss the effect of the price maintenance systems upon interstate commerce.

title to which passes to a licensed Colorado wholesaler at the Colorado State line and which comes to rest in his ownership and custody in his Colorado warehouse for the purpose of having tax stamps affixed and for ultimate disposition to a local retailer is no longer an integral part of interstate commerce. This conclusion is so clearly correct and so plainly supported by the cases cited for it that the Government's claim to the contrary may be properly characterized as frivolous.

This case does not present questions of general importance but a narrow issue with respect to the construction of one count of a particular indictment in the light of peculiar local legislation.

The petition urges that the decision of the lower court should be reviewed because it presents important questions concerning the application of the Sherman Act to conspiracies to induce or require producers to sell under price maintenance contracts establishing minimum retail or wholesale prices in purported compliance with state fair trade laws and the Miller-Tydings Act of August 17, 1937, 50 Stat. 693.

The lower court's decision was that the allegations of Count Two of this indictment were insufficient to establish a restraint of interstate commerce in violation of the Sherman Act. Those allegations related wholly to retail prices. They included the allegation that retailers could purchase liquor only from duly licensed Colorado wholesalers. The Count was considered by the court in the light of the Colorado liquor legislation imposing restrictions in aid of local regulation which effectively insulated retail transactions from interstate commerce. It is apparent that the issue involved is not one of general application but turns

upon the peculiar and limited allegations of this indictment and the unusual provisions of the Colorado statutes. No similar question is involved in the three pending cases cited by the Government, or is likely to be involved in any future case not involving liquor legislation substantially the same as that of Colorado.

In fact, not even another Colorado liquor indictment is likely to raise this narrow issue. As already pointed out, Count One of the indictment alleged a conspiracy with respect to wholesale prices but was dismissed when the Government elected to stand on Count Two. The indictment was not, as it might have been, drawn to present in one count the Government's claim of conspiracy with respect to both wholesale and retail prices. That such a conspiracy, giving the participants a definite price spread, is the typical one is shown by the fact that each of the cases cited by the Government presents such a situation. The indictments in *United States* v. *National Association of Retail Druggists*, No. 683C (Criminal), D. C. N. J., and *United States* v. *New York State Pharmaceutical Association*, No. C-114-75, S. D. N. Y., each allege in one count a conspiracy with respect to both wholesale and retail prices and the indictment in *United States* v. *National Wholesale Druggists' Association*, No. 618C (Criminal), D. C. N. J., alleges a conspiracy with respect to wholesale purchasing and selling prices. Each of the indictments also alleges that part of the wholesale sales to which the conspiracy relates were actually interstate sales. The issues presented by those cases may be of general importance. The difficulty is that this case presents not those issues but narrow and local ones.

There is an additional reason why the present case is not one for review for the purpose of settling general ques-

tions of application of the Sherman Act. This case raises special problems of conflict with Colorado's local policy for regulation of the liquor business. Retail sale of liquor in Colorado is completely insulated from interstate commerce to facilitate Colorado's program for supervision of that business. Under the Twenty-first Amendment to the Constitution Colorado can enforce such insulation notwithstanding the commerce clause. Another aspect of Colorado's regulation of the liquor traffic is the encouragement of resale price maintenance in connection with it.[1] The extension of Federal power under the Sherman Act into the field of retail liquor sales in Colorado plainly involves serious repercussions on Colorado's policy of regulation.

We urge that a case, presenting both facts and considerations of local policy peculiar to the liquor business, is not an appropriate one for settlement of general questions of the application of the Sherman Act. This is particularly true when, by reason of a defect in the pleadings, the record does not present all the alleged facts, even with respect to the liquor business, and the narrow issue presented, so far as appears, will never arise again.

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[1] By Section 3 of the Colorado Liquor Code it is made unlawful:

"To wilfully and knowingly advertise or offer for sale or sell any malt liquors, vinous liquors, spirituous liquors and alcoholic beverages whether the person so advertising, offering for sale or selling is or is not a party to such contract, at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act, the same being Chapter 146, Session Laws of Colorado, 1937." Session Laws 1941, Ch. 160, Amending Chapter 89, Section 17, Colorado Statutes Annotated (1935).

CONCLUSION.

The petition for writs of certiorari should be denied.

Respectfully submitted.

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